

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOLO, JR.
CLERK

89-1561

No. _____

In The
Supreme Court of the United States
October Term, 1989

MARSHA CAMPBELL, administratrix of the
estate of MICHAEL ALLEN CAMPBELL,

Petitioner,

v.

CITY OF PHILADELPHIA, SERGEANT WILLIAM
SCHMID and OFFICER WILLIAM CONAWAY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
AND PETITIONER'S APPENDIX**

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Philadelphia, PA 19106
215/922-5135

Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

This case stems from the suicide of Michael Allen Campbell while he was in the custody of the Philadelphia police. Campbell hung himself with his shoelaces. Respondents/defendants are the individual officers who were obliged, under the City's own directive, to remove Campbell's shoelaces and who failed to do so. Petitioner's/plaintiff's federal claim was dismissed on a motion for a directed verdict, but plaintiff prevailed before a jury on her state law negligence claim.

The defendants moved for judgment notwithstanding the verdict, asserting that plaintiff's evidence was fatally defective because there was no evidence that the defendants knew Campbell was suicidal before his death. The defendants had not raised this argument during their motion for a directed verdict or at any time during the trial. Nevertheless, the district court granted defendants' motion and the court of appeals affirmed the district court's action.

This case presents the following question.

1. Where a defendant does not move for a directed verdict on the ground that plaintiff's case is fatally defective in the absence of certain specific proof and fails to raise this ground at any other point during the trial, may a court subsequently reverse a jury's verdict on this ground?

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REFERENCE TO OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit, dated January 2, 1990, is not reported, but appears in the appendix at App. 1.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania, dated February 1, 1989, is also unreported, and is reproduced at App. 3.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1990. Rehearing *in banc* was denied on January 31, 1990. Jurisdiction of this Court is proper under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CONCERNED

The Seventh Amendment of the United States Constitution states:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50(b) of the Federal Rules of Civil Procedure provides, in relevant part, that

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for

any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party that has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict.

STATEMENT OF THE CASE

Plaintiffs' decedent, Michael Allen Campbell, was arrested by the police on April 25, 1986. Campbell, who was 32 years old, had never been arrested before. He was taken to the Philadelphia Police Department's 35th district. He offered no resistance and was quiet and cooperative during his entire time in police custody.

As the defendants were aware, suicide is a major problem in police cellrooms in Philadelphia. In the thirty-eight months preceding Campbell's arrest there were at least 35 attempted or successful suicides in cellrooms around the city, an average of nearly one per month. In the thirteen months preceding April 25, 1986, there had been three attempted suicides in the 35th district cellroom alone, with one occurring just twelve weeks earlier.

In order to protect prisoners from the known risk of suicide, the Philadelphia Police Department had adopted Directive 82, Appendix C. This directive requires that certain specified items, including shoelaces, be removed

from *all* prisoners.¹ The police department did not provide training to enable officers to distinguish between those who presented a particular risk of suicide and those who did not, nor did it expect officers would attempt to do so and then rely on their attempts. The officers who testified stated that they could not reliably identify those who might be suicidal.

Defendants William Conaway and William Schmid were the officers responsible for making sure that Michael Campbell's shoelaces were removed. Despite their awareness of the risk of suicide and of the specific potential of shoelaces as an instrument of suicide and of their own inability to identify those at risk, Conaway and Schmid did not remove Campbell's shoelaces.

At approximately 2:30 p.m on April 26, Campbell was found hanging in his cell. He used his shoelaces to hang himself.

The case was tried to a jury on state and federal claims. Following the close of all the evidence the defendants moved for a directed verdict on the federal and state claims. As to the pertinent issue on the state law claim, the following exchange occurred.

¹ This uniform precaution is in keeping with the standards recommended by all professional law enforcement associations. Unfortunately, the requirements of directive 82 were not always observed. For example, the attempted suicide twelve weeks before Campbell's arrest had used his shoelaces to hang himself. The individual who placed that prisoner in his cell – defendant William Conaway – was the same individual who placed Campbell in his cell.

Mr. Soltz [counsel for the defendants]: . . . [I]n a negligence case, you need some notice, and there's no notice of any vulnerability to suicide.

The Court: . . . [T]he only notice that there can be would be the perhaps general notice that police who are in charge of a lockup would have that that is a problem, that is a general problem with newly arrested people, and to keep an eye on them. You know, a general knowledge. I agree with you. There is nothing in this case as to - to give the police notice as to there being anything different about this individual, Michael Campbell, than any other prisoner, other than any difference would be that he was more polite than others or - so that they would not be negative things. They were positive things.

So, I would think, you know, if any negligence could be predicated in this situation, it would have to be based upon the police generally knowing that this is a somewhat danger area and that the jury saying, with that knowledge, you should take things like shoelaces away. . . And that it was negligence not to do it.

Mr. Soltz: That might suffice in the state negligence claim, Your Honor, but the federal claim is much stricter . . .

The Court: Well, we're not talking about the federal claim.

Mr. Soltz: Okay.

The Court: We're talking about the state claim.

Mr. Soltz: Very good. I see your point.

Notes of Testimony 6/2/88, 52-53. The defendants did not offer any further argument as to the state law claim, and plaintiff's counsel did not argue as to that claim.

The district court granted defendants' directed verdict motion as to plaintiff's federal claim, but permitted the state claim to go to the jury. The jury determined that defendants Conaway and Schmid failed to use ordinary care and that their failure caused Michael Campbell's death.² Judgment was entered for the plaintiffs and against Conaway, Schmid, and the City of Philadelphia.

In their post-trial motions the defendants asserted that plaintiff's case was fatally defective in the absence of evidence that they knew Michael Campbell was suicidal. The defendants argued that since they had no notice Michael Campbell was suicidal they did not owe him a duty to use ordinary care. Plaintiff responded in part that the defendants never raised this argument at trial and, in particular, that it was not offered as a basis for their directed verdict motion.³

Without discussing plaintiff's claim of waiver, the district court accepted the defendants' argument and entered judgment in their favor. Plaintiff filed a timely appeal contending, in relevant part, that the defendants had failed to preserve the issue on which they prevailed post-trial.⁴ After argument on December 15, 1989, the Third Circuit entered a judgment order affirming the lower court on January 2, 1990. No opinion was issued.

² The jury also determined that two other individuals, originally defendants, were negligent, but that their negligence was not the cause of any harm.

³ Plaintiff also argued the merits of the case, which raise a question of Pennsylvania negligence law.

⁴ Again, plaintiff also addressed the merits of defendants' argument.

Thus, without any explanation, both the district court and the appellate court permitted defendants to raise an argument post-trial that had not been presented on the motion for a directed verdict.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the Constitution guarantees the right to trial by jury in civil cases. The Federal Rules of Civil Procedure have been carefully crafted to protect this right while at the same time recognizing the critical role of the court in resolving questions of law. The district court here simply disregarded the Federal Rules of Civil Procedure and the rights guaranteed under the Seventh Amendment. It permitted the defendants, who had lost the case before a jury, to re-try the case before the court on a distinctly new theory. The Third Circuit accepted this procedure, without any limitation or explanation. This is entirely inconsistent with existing law and is such a departure from accepted proceedings as to warrant review by this Court. Review is also appropriate here in order to clearly define what a party must do to preserve an issue for presentation on a motion for judgment notwithstanding the verdict, consistent with the Federal Rules and under the Seventh Amendment. This question has not been resolved by this Court and the circuit courts have established varying rules.⁵

⁵ This case also raises a troubling question regarding the level of scrutiny an appellate court will use in reviewing a district court's grant of judgment NOV. Entry of judgment
(Continued on following page)

The right to a jury trial, guaranteed by the Seventh Amendment, is central to our system of justice. At the same time, of course, the judge plays a critical role in instructing the jury as to relevant principles of law and deciding legal questions. The balance between the functions of judge and jury must be carefully struck and painstakingly guarded, lest either entity interfere with the essential role of the other.

In the federal courts, this balance is accomplished through Federal Rule of Civil Procedure 50. The rule requires, in relevant part, that if a party is to request that a judge enter judgment contrary to a jury's verdict, that party must first present the same ground to the judge *before* the jury begins its deliberations. This insures that all the relevant evidence and all the significant questions of fact are presented to the jury, which is the sole arbiter of fact. More to the point, this prevents a party from

(Continued from previous page)

NOV should be subjected to close scrutiny by an appellate court because of the possibility that in reversing a jury's verdict, a trial judge has impermissibly substituted his own judgment for that of the jury in contravention of the Seventh Amendment. This scrutiny is necessary to preserve the integrity of the jury system. The appellate panel here affirmed the district court's grant of judgment NOV without opinion or explanation, despite the presence of a substantial issue of federal procedure with constitutional implications as well as one of Pennsylvania law. The procedural question was also ignored by the district court. Under these circumstances, it appears that the panel did not fulfill its obligation to carefully review the district court's grant of judgment NOV, but instead permitted the substitution of a court's judgment for that of a jury. This undermines the very foundation of the jury system.

presenting a new and distinct theory of the case after the jury's verdict.

The danger of allowing a party to present a case to a jury on one theory and, in the event of an unfavorable result, to a court on a different theory is manifest. Such a practice eviscerates the right of trial by jury. The jury's findings of fact may become meaningless when the case is cast in a new light.⁶ Indeed, the jury can be deprived of its essential function because whatever conclusions it reaches may be rendered irrelevant by constructing a new legal framework from which to view the case. By presenting the case to a court on a new theory after a jury verdict, a party effectively evades the jury entirely, and thereby frustrates the opposing party's right to trial by jury.

Thus, the requirement that a party must present a ground for judgment NOV during a motion for a directed verdict is not merely a procedural nicety. It is vital to the operation of the jury system. It is a rule that must be strictly enforced if the right to trial by jury guaranteed by the Seventh Amendment is to be meaningful.

⁶ This is precisely the case here. The jury found that the defendants failed to use ordinary care. Neither the defendants nor the reviewing courts have challenged this finding, nor could they, given the evidence presented. Yet the jury's finding has become meaningless in light of the defendants' new assertion that they had no obligation to use ordinary care in the first place. The district court reached this conclusion by raising new issues of fact, that were never presented to the jury, and then reaching its own conclusion as to those facts. See App. 7.

The defendants here presented an issue post-trial that was not presented during the trial. The defendants obtained judgment NOV on the theory that plaintiff's case was fatally defective because there was no evidence that the defendants knew Michael Campbell was suicidal before his death. This is not a theory they raised at any time during the trial.

At the close of all of the evidence, the defendants did indeed move for a directed verdict. Under Rule 50 and prevailing case law, this was the occasion on which they were obliged to present any ground if they were to be permitted to raise it post-trial. After offering argument on plaintiff's federal claim, the defendants turned to plaintiff's state law negligence claim. Initially, counsel addressed several points not at issue here. The critical portion of the exchange for purposes here is set forth in full at 4, *supra*.

Two things are clear from the exchange. First, the court did not understand the defendants to be advancing an argument that the failure to prove notice of a specific individual's special vulnerability was *necessarily* fatal to plaintiff's case. The court agreed that there was no evidence of any special vulnerability with regard to Michael Campbell, but did not consider dismissing the case on that basis. The court understood the motion to be addressed to the question whether the defendants' conduct was negligent – that is, whether the failure to take the shoelaces under all the circumstances could constitute a failure to use ordinary care – and considered the lack of

particular knowledge about Campbell to be a factor for the jury's consideration.⁷

Second, and most critically, the defendants agreed with the court's interpretation of their motion and of the law. Once the court had outlined its understanding of the theory of the case, the defendants acknowledged that that "might suffice" under state law. The defendants never asserted that given the court's own observation that there was no evidence of Campbell's particular vulnerability, their position was that the court was required to grant the defendants' directed verdict motion. Quite the contrary, reminded that they were discussing the state law claim, the defendants conceded the court's point and made no further argument. The defendants never suggested that they were entitled to prevail, as a matter of law, in the absence of evidence that they knew Campbell was suicidal.

The defendants' conduct of the directed verdict motion is consistent with the defendants' overall conduct of the trial. The defendants never requested that the jury be charged that in the absence of evidence of notice as to Michael Campbell's vulnerability to suicide, a verdict in their favor was required. They never advanced a legal theory under which proof of notice about a particular individual was a necessary element of plaintiff's negligence claim. They never mentioned the cases they relied

⁷ Consistent with this understanding the court charged the jury that, in determining whether the defendants used ordinary care, it should consider what the defendants knew about Michael Campbell, including what they knew about his vulnerability to suicide.

on post-trial. They never asserted that they did not owe Michael Campbell a duty to use reasonable care, or that the question whether there was a duty turned on the specific facts established by plaintiff.⁸ Thus, there can be no assertion that, although the defendants did not raise the matter on a directed verdict motion, they nevertheless effectively put plaintiff on notice of their claim. The defendants never raised their claim in any way during the trial.

Despite the defendants' failure to present the issue at trial, both the district and appellate court allowed the defendants to raise the issue as a ground for judgment NOV. Neither offered any rationale or justification for its action. The actions of the district and appellate courts are such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The requirement imposed by the Seventh Amendment and Rule 50(b) that a party must present an argument as a basis for a directed verdict motion, or at least at some point during the trial, before it can be presented as a basis for judgment NOV has been widely recognized by commentators and courts alike, although they are not in complete agreement concerning the manner in which issues must be raised and the appropriate analysis where an issue is not raised. The Ninth Circuit has adopted a rule which honors the letter as well as the spirit of the

⁸ Again, to the contrary, the defendants conceded at the outset of the trial that they owed a general duty to protect prisoners from harm, including from self-inflicted harm. N.T. 5/31/88, 9-10.

Rule, *Farley Transportation Co. v. Santa Fe Transportation Co.*, 786 F.2d 1342, 1346-47 and n. 2 (9th Cir. 1985) (adopting strict application of Rule 50 and specifically rejecting Seventh Circuit standard), while the Seventh Circuit permits consideration of issues not raised so long as there is no prejudice. See, e.g., *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1388 (5th Cir. 1984). The Seventh Circuit also permits consideration of questions of pure law, even where they were not raised earlier. *Benson v. Alphin*, 786 F.2d 268, 273-75 (7th Cir. 1986) (qualified immunity, a purely legal issue, can be raised as ground for judgment NOV notwithstanding failure to raise on directed verdict motion). But see, *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980)(*res judicata*, a purely legal question, cannot be raised post-trial if not raised on motion for directed verdict). Also, see generally, *Pittsburgh-Des Moines Steel v. Brookhaven Manor Water, Co.*, 532 F.2d 572, 576-77 (7th Cir. 1976)(ground raised during colloquy on jury instructions constituted sufficient predicate for motion for judgment NOV); *House of Koscot Development Corp. v. American Line Cosmetics*, 468 F.2d 64, 68 (5th Cir. 1972)(ground not raised on directed verdict cannot be presented as ground for judgment NOV); 9 Wright and Miller, Federal Practice and Procedure, Section 2537 at 581 (1971).

For the most part (excepting this case) the law in the Third Circuit has been relatively clear, and more generally aligned with that of the Ninth Circuit than with that of the Seventh. The Third Circuit has stated that "the specific grounds for a JNOV must be asserted in the motion for a directed verdict. . . . If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on

that issue." *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814 (3d Cir. 1984) (citations omitted). See also *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989);⁹ *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), cert. denied, 104 S.Ct. 3513 (1984); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831 (3d Cir. 1983); *Wall v. United States*, 592 F.2d 154, 159-60 (3d Cir. 1979); *Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken*, 536 F.2d 9, 11 (3d Cir. 1976).

In this case, the Third Circuit has apparently created a new exception (if undefined) to its rule that a ground for JNOV must first be raised on a directed verdict motion. This exception does not parallel any created by any other circuit. Creation of such an exception seriously undermines the core values of the jury system.¹⁰ It

⁹ Ironically, *Kutner* reversed a grant of JNOV by the same district court that entered the judgment at issue here. Thus, this is not the first instance where this district judge granted JNOV on a ground not presented as a basis for a directed verdict motion. In *Kutner* the judge expressly stated that he was granting JNOV on a ground not raised by the defendants. See, *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989). The opinion in *Kutner* was issued after the district court entered its opinion in this case. At the time the opinion in this case was written, the district court did not have the benefit of the court's direction in *Kutner*.

¹⁰ The Third Circuit's new rule also creates even further confusion about the appropriate standard to be followed by both district and appellate courts. At a minimum, any exception to the established rule must be narrowly and clearly defined. The appellate panel here has offered no guidance as to the circumstances where a ground not raised for a directed verdict motion can be pursued post-trial.

permits the defendants to present the case to the jury on one theory and, in the event of an adverse result, to relitigate the case before the court on another theory. This effectively nullifies the jury's function as the trier of fact in any meaningful sense.

The appellate courts are in disarray on this critical question. Widely varying standards are applied in different circuits, and apparently even within circuits. This Court has never resolved or addressed the apparent tension between permitting entry of judgment notwithstanding a jury's verdict and the constitutional guarantee of a right to trial by jury. Review here can resolve this tension, and at the same time will preserve the right to trial by jury and, in fairness to plaintiffs and defendants alike, ensure application of a uniform standard.

CONCLUSION

Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1163

CAMPBELL, MARSHA, ADMINISTRATRIX OF
THE ESTATE OF CAMPBELL, MICHAEL AL-
LEN AND CAMPBELL, ROBERT AND
HORATIA,

Appellants

vs.

CITY OF PHILADELPHIA and OFFICER RICH-
ARD BYRD, OFFICER ARTHUR ALKER, SER-
GEANT WILLIAM SCHMID and OFFICER
WILLIAM CONAWAY

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. 87-0854)

District Judge: Honorable Robert F. Kelly

Argued December 15, 1989

BEFORE: STAPLETON, GREENBURG, and GARTH,
Circuit Judges,

JUDGMENT ORDER

After consideration of the contentions raised by ap-
pellants, it is

ORDERED AND ADJUDGED that the judgment of
the district court dated February 1, 1989, be and is hereby
affirmed.

App. 2

Costs taxed against appellants.

By the Court,

/s/ Walter Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos, Clerk
Sally Mrvos, Clerk

DATED: Jan 2 1990

App. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARSHA CAMPBELL,	:	CIVIL ACTION
Administratrix of the Estate of	:	
MICHAEL ALLEN CAMPBELL;	:	
and ROBERT and HORATIA	:	
CAMPBELL	:	
v.		
CITY OF PHILADELPHIA; and	:	
POLICE OFFICERS JOHN DOE	:	
and RICHARD ROE	:	NO. 87-0854

MEMORANDUM AND ORDER

R. F. KELLY, J.

February 1, 1989

Plaintiff, is the Administratrix of the Estate of Michael Campbell, who hanged himself while in a detention cell at the 35th Police District in Philadelphia, Pennsylvania on April 6, 1986. This law suit was filed against the City of Philadelphia and individual police officers alleging both federal civil rights claims and state negligence claims.

At the close of the evidence, we directed verdicts in favor of the defendants on all of the federal civil rights claims under 42 U.S.C. §1983. The jury decided in favor of the plaintiffs on the remaining state negligence claims and returned verdicts against the City of Philadelphia and the individual police officers, Conaway and Smith, in the total amount of Four Hundred Seventy Eight Thousand, One Hundred Four Dollars. (\$478,104).

The defendants have filed Post Trial Motions requesting judgment n.o.v. and in the alternative a Motion For

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New Trial. These are now before the court for determination.

The facts developed at the trial indicate that on April 25, 1986, plaintiffs' decedent Michael Campbell entered a bar at 4530 Wayne Avenue in Philadelphia, approached one Walter Matthews and stabbed him in the back with a twelve (12) inch knife. Campbell was arrested by Philadelphia Police Officer Thomas Kane at approximately 3:05 P.M. He was taken to the 14th Police District at Germantown Avenue and Haines Street and later transferred to the Northwest Detective Division located in the 35th Police District at Broad and Champlust Streets.

Campbell was processed and placed in cell No. 8 at or about 7:50 P.M. on April 25, 1986. The uncontradicted evidence indicated that he was processed there without incident.

Sgt. Paul Musi was working as the Operation Room Supervisor on the morning of April 26, 1986. One of the functions of the Operation Room Supervisor is to check the cell blocks every half hour to determine the condition of each prisoner. The Turnkey on duty that morning was an Officer Hillgen. One of the functions of the Turnkey is to check the cell block every fifteen minutes to see that the inmates were alright. The cellblock at the 35th Police District contained two rows of nine cells each for a total of eighteen cells.

On the morning of April 26, 1986 at about 8:30 A.M., the inmate of cell No.7 flooded the cell and the cellblock by stopping the drain in his toilet. When the Turnkey Officer Hillgen entered cell No. 7 to unplug the drain, the inmate punched Hillgen in the face breaking his glasses

and requiring that Hillgen be taken to Hahnemann Hospital for the purpose of having glass removed from his face. This meant that the remaining officers at the station (Byrd and Alker) had to take over the duties of the Turnkey. They testified that they did this by walking up and down each cellblock every fifteen minutes looking into each cell to check on the conditions of the prisoners. In addition to the fifteen minute checks, officers were constantly in the cellblock bringing prisoners out to be fingerprinted, photographed or for bail hearings. They testified that every prisoner had to be removed from the cell at least three times for fingerprinting, photographing and bail hearings.

On the morning of April 26, 1986, Michael Campbell was taken from his cell for an ROR interview. Officer Byrd said that Michael Campbell seemed fine at that time. At approximately 1:50 P.M., Officer Byrd took a Mr. Santiago from cell No. 9 for a TV arraignment which took approximately five to ten minutes. Santiago was then allowed to make a phone call which took another five to ten minutes, after which he was returned to cell No. 9 about 2:10 or 2:12 P.M. At that time when Officer Byrd passed Michael Campbell's cell, he said he was sitting on the bench and there was nothing unusual about his appearance.

Officer Alker testified that during the course of the morning of April 26, 1986, he received calls from Michael Campbell's family and that he relayed the contents of those calls to Michael Campbell. Officer Alker told Michael Campbell among other things that his family said that after he went before the judge if he needed bail money he was to call them. Officer Alker testified that at

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all times Michael Campbell was cooperative, very polite and mannerly when he spoke to him. Officer Alker also testified that Michael Campbell's conversation with the ROR interviewer took place in Officer Alker's presence and that telephone conversation gave no indication of any distress on the part of Michael Campbell. After the phone call, Michael Campbell was returned to his cell. On the way back, he was advised that his lunch was there. He thanked the officer and was returned to his cell without incident.

A short time later when the officer went back to the cellblock to tell another prisoner to quiet down, he saw Michael Campbell hanging from the bars at the side of his cell tied with what appeared to be shoelaces around his neck at a point about 3 $\frac{1}{2}$ to 4 feet above the floor. The officers used CPR and summoned the rescue squad but Michael Campbell died later at the hospital.

None of the five family members of Michael Campbell who testified at the trial, including a sister who received a phone call from him while he was in police custody, testified to noticing anything unusual about his behavior.

It was defendants' position at trial, renewed here in Post Trial Motions, that the plaintiffs presented no evidence that would suggest that the defendant police officers knew or had reason to know that the decedent was suicidal and that this lack of evidence rendered the case insufficient for the jury's consideration. We agree with this position.

The only time the police owe a duty to an individual is where they enter into a "special relationship" with that

individual. The person claiming that a "special relationship" existed is required to prove that the police had actual knowledge of the individuals particular risk of harm. As explained in *Melendez by Melendez v. City of Philadelphia*, 320 Pa. Super 59, 466 A.2d 1060, 1064 (1981), the plaintiffs were required to demonstrate that the police were (1) aware of the individuals particular situation or unique status, (2) had knowledge of the potential for the particular harm which the individual suffered, and (3) voluntarily assumed, in light of that knowledge, to protect the individual from the precise harm that was occasioned.

These elements were not shown in the present case. While plaintiffs attempted to show that there was a general statistical risk of suicide in the prison population, they failed to produce any evidence to demonstrate that the police were aware that Campbell was suicidal. As a matter of fact, none of the five family members who testified, including a sister who received a phone call from him while he was in police custody, testified to noticing anything unusual about his behavior. The police officers who had contact with Campbell agreed that there was nothing unusual about his behavior, let alone anything to indicate that he was contemplating suicide. The mere possible failure of the police to remove decedents shoe laces, without more, cannot justify a finding of negligence under the facts of this case. It is clear to us therefore that judgment n.o.v. should be entered in favor of the defendants.

For these reasons we enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARSHA CAMPBELL,	:	CIVIL ACTION
Administratrix of the Estate of	:	
MICHAEL ALLEN CAMPBELL;	:	
and ROBERT and HORATIA	:	
CAMPBELL	:	
v.		
CITY OF PHILADELPHIA; and	:	
POLICE OFFICERS JOHN DOE	:	
and RICHARD ROE	:	NO. 87-0854

ORDER

AND NOW, this 1st day of February, 1989, judgment n.o.v. is hereby entered in favor of the defendants, City of Philadelphia, Sgt. William Schmid and Officer William Conaway, and against the plaintiffs, Marsha Campbell, Administratrix of the Estate of Michael Allen Campbell and Robert and Horatia Campbell.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly

J.



MAY 1 1989

No. 89-1561

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1989

MARSHA CAMPBELL, Administratrix of the Estate of
MICHAEL CAMPBELL,

Petitioner

vs.

CITY OF PHILADELPHIA, SERGEANT WILLIAM SCHMID
and OFFICER WILLIAM CONAWAY,

Respondents

**BRIEF OF RESPONDENT, CITY OF PHILADELPHIA,
IN OPPOSITION TO A PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS**

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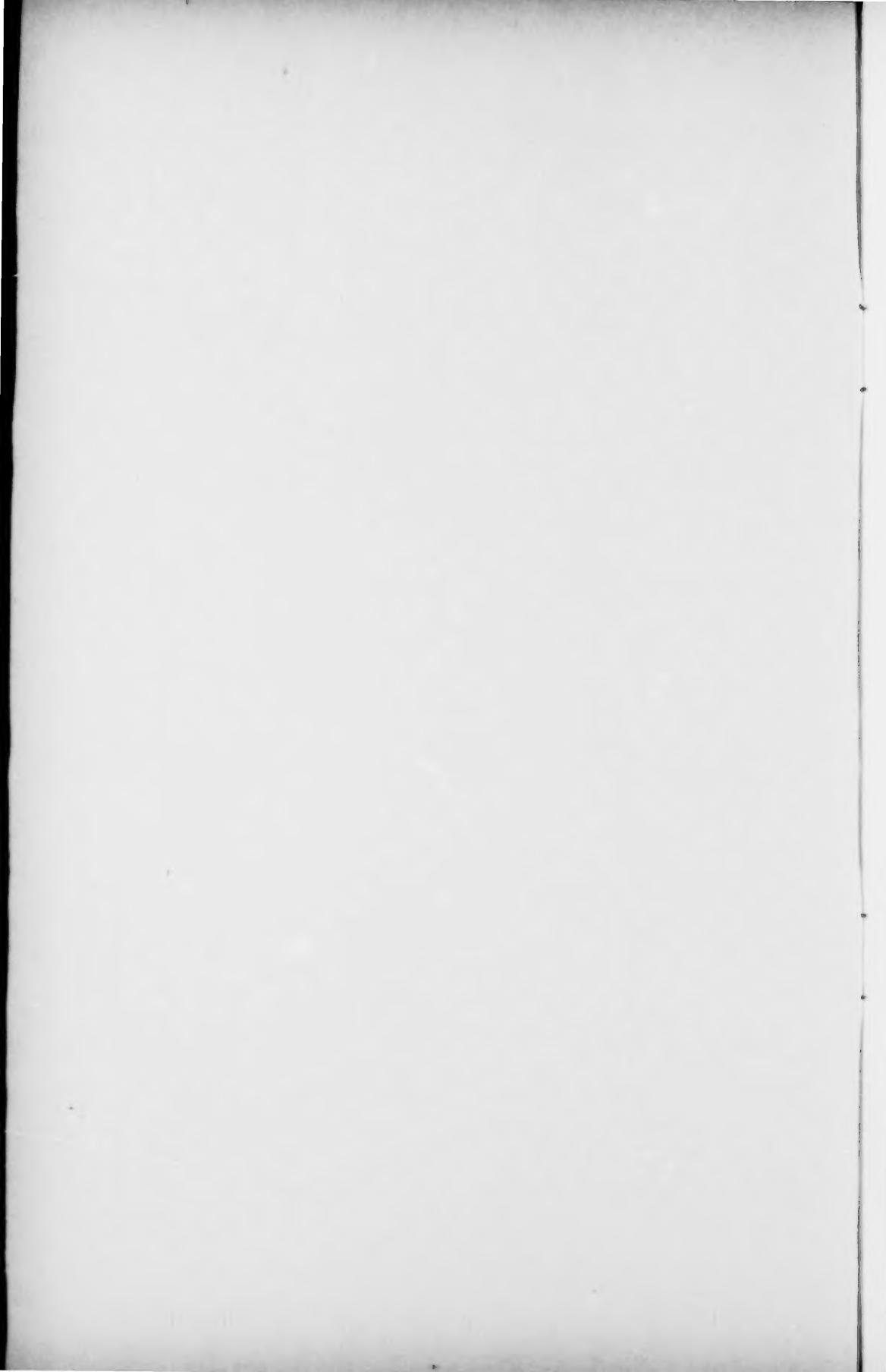
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Counter-Statement of the Question Presented for Review

**COUNTER-STATEMENT OF THE QUESTION
PRESENTED FOR REVIEW**

Where the motion for a directed verdict pursuant to Rule 50, after presentation of the plaintiff's evidence, stated that the plaintiff's claim (both Federal *and* State) failed for lack of any proof of a "particular vulnerability" to suicide on the part of the plaintiff's detainee-decedent, does the motion preserve the issue during trial and post-trial and permit the award of judgment notwithstanding the verdict to stand?

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TABLE OF AUTHORITIES

CASE:

Thezan v. Maritime Overseas Corp., 708 F.2d 175 (5th Cir. 1983), cert. denied 464 U.S. 1050 (1984) . . .	5
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RULE:

Fed. R.C.P. 50	i, 1, 3, 5
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OTHER AUTHORITY:

Restatement of the Law (Second) of Torts:	
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§314	4
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§314A	2, 4
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Counter-Statement of the Case

COUNTER-STATEMENT OF THE CASE

The plaintiff's decedent was detained by the Philadelphia police after an incident in which he stabbed another patron in a local bar room. Mr. Campbell was not intoxicated at the time and was quiet, cooperative and polite during his incarceration. There was no behavior in his past that could have forewarned his custodians that he had a particular vulnerability to suicide. Even plaintiff's own attorney agreed that "the police simply had no reasons in the world to think that Mr. Campbell was any particular suicide risk." (A. 196)

When the jury retired to the jury room after plaintiff's case rested, the City's attorney made a motion for a directed verdict, which, in pertinent part, stated the following:

... Pursuant to Rule 50, Your Honor, going to move for a directed verdict first, on all the Federal claims, specifically as to the suicide violating some Federal right. The *Colburn* case, which is cited in our trial brief and which is reported at 838 Fed. Second 663, very specifically states at 669 ... 'of course we agree that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know,' and here's the key language, 'of the particular vulnerability to suicide of an inmate, then the 14th Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.' And here's where I think plaintiff's Federal claim totally fails. She has not shown any particular vulnerability on the part of Michael Campbell ... There is just no evidence whatsoever that this individual had a vulnerability to suicide.

• • •

Counter-Statement of the Case

I'd make the same motion as to the State negligence claims. Again, an element of a negligence claim is a known danger, notice of danger. And, again, here is no notice that there was anything about ...

The COURT: I agree. I think it is a very, very thin case, but I'm going to let it continue.

(A. 161-163).

After the City's case was presented, its counsel again argued for the dismissal of the cause of action. A portion of the argument was as follows:

And in our trial brief we cite the *Scarborough* case [a State case] that says you can't premise a negligence case on the violation of a directive alone. So I think her negligence claim has to fail, too, on that basis, plus again, in a negligence case you need some notice of any vulnerability to suicide. So I think Your Honor has to discuss the State claim.

(A. 214).

The City's brief in support of the post-trial motion quotes the Restatement of the Law (Second) of Torts at §314A (discussing "special relationships") as stating:

... The defendant is not required to take any action until he knows or has reason to know that *the plaintiff* is endangered or is ill, or injured—the very fact plaintiffs failed to prove. Moreover, Pennsylvania law imposes a higher standard than that set forth in Section 314A—it requires actual knowledge of the plaintiff's particular situation, *Melendez*.

(A. 217) (emphasis in original).

*Summary of Argument***SUMMARY OF ARGUMENT**

Plaintiff-petitioner misstates her question as presented to this court. The fatal defect in plaintiff's proof of knowledge of a special vulnerability to suicide on the part of her decedent was consistently preserved. Whatever "split" in the authorities in the various circuits she may discern on a question of preservation of issues under Rule 50 is irrelevant to this case.

*Argument*ARGUMENT

The question as presented by the plaintiff claims that the directed verdict motion "waived" the ground that plaintiff's case was "fatally defective in the absence of certain specific proof". In fact, the directed verdict and the entire record show that the City repeatedly argued that a record devoid of specific proof of knowledge of a particular vulnerability to suicide on the part of the decedent was fatal to plaintiff's case.

Apparently, therefore, the plaintiff's actual argument is that phrases such as "an element of a negligence case is a known danger, notice of danger" are inadequate to inform the court and jury that a duty does not arise in a custodial situation to protect an individual from a danger until the custodian knows or has reason to know of the particular danger. This is hair-splitting; without duty, there can be no liability. "Duty" under the instant circumstances only arises (as was *repeatedly* argued) *with knowledge* of the particular vulnerability of the individual.

Plaintiff has misstated her own question of law. The fatal defect in her record *was* the focus of the City throughout and *was* preserved, both as the Federal *and* the State negligence issues. Plaintiff argues that the City asserted that "they did not owe Michael Campbell a duty to use reasonable care, or that the question whether there was a duty turned on the specific facts established by plaintiff." (p. 11) Of course the City never made such assertions. Under Restatement §314, there is ordinarily *no* duty of care to protect others, [upon non-supervisory persons] even *with* knowledge of a particular danger. Under Restatement §314A, [regarding "special relationships"], there is a duty upon a caretaker or supervisor to protect a custodial

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Argument

person from specific dangers that the supervisor knows or has reason to know may threaten the particular individual. It would be strange indeed if the City argued that it "did not owe" its detainees *any* duty or disputed the fact that its duty "turned on specific facts" which had to be "established by the plaintiff".

The problem here is, merely, that plaintiff did *not* meet her burden of proof: knowledge of a particular vulnerability to suicide on the part of Mr. Campbell. This was a burden of proof that the City preserved throughout.

The purpose of a Rule 50 Motion for a directed verdict is "to apprise the trial court of the movant's position." *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 n. 2 (5th Cir. 1983), *cert. denied* 464 U.S. 1050 (1984). "[T]echnical precision is not necessary in stating grounds for the motion," *id.* The City argued from first to last that the record was devoid of evidence that *anyone*—even decedent's family, and certainly not the police officers who had him in their charge—had the least notion that he presented a suicide risk. Further, the City argued that without knowledge or reason to know there was no case, in Federal or State law. The City request a directed verdict on those grounds after plaintiff's case. The City proposed jury instructions directing a verdict. The City requested J.N.O.V. promptly. The trial judge correctly granted that relief.

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Conclusion

CONCLUSION

There is no merit to plaintiff's argument. Whatever "split" of authority she may discern among the Circuits involving a point of law based on the Federal Rules, it does not apply on these facts. The issue was preserved. It was decisive on the facts of record. The case was properly resolved and must be affirmed.

Respectfully submitted,
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